

AMENDED IN ASSEMBLY MAY 27, 2005

AMENDED IN ASSEMBLY MAY 3, 2005

AMENDED IN ASSEMBLY APRIL 21, 2005

CALIFORNIA LEGISLATURE—2005–06 REGULAR SESSION

ASSEMBLY BILL

No. 1699

Introduced by Assembly Member Frommer

February 22, 2005

An act to add and repeal Article 6.9 (commencing with Section 20209.20) of Chapter 1 of Part 3 of Division 2 of the Public Contract Code, relating to transportation.

LEGISLATIVE COUNSEL'S DIGEST

AB 1699, as amended, Frommer. Transportation: highway construction contracts: design-build projects.

(1) Existing law sets forth requirements for the solicitation and evaluation of bids and the awarding of contracts by public entities for the erection, construction, alteration, repair, or improvement of any public structure, building, road, or other public improvement. Existing law also authorizes specified state agencies, cities, and counties to implement alternative procedures for the awarding of contracts on a design-build basis.

This bill would authorize, until January 1, 2015, transportation agencies administering local voter-approved transportation sales tax measures to use a specified design-build process for bidding on a maximum of 8 state highway construction projects with a total cost of ~~\$25,000,000~~ *\$10,000,000* or more, *as specified*, with the projects to be selected by the California Transportation Commission.

The bill would require design-build entity bidders to provide certain information in a questionnaire submitted to the transportation agency that is verified under oath. Because a verification under oath is made under penalty of perjury, the bill would create a new crime and impose a state-mandated local program. ~~The~~ *After a contract is awarded, the bill would require a the transportation agency to report to specified committees of the Legislature regarding implementation of the design-build process.*

~~This bill would require the Bureau of State Audits to conduct a preproject and postproject audit of each project and to compare them to similar design-bid-build or design sequencing projects and report the results to the Legislature.~~

(2) The California Constitution requires the state to reimburse local agencies and school districts for certain costs mandated by the state. Statutory provisions establish procedures for making that reimbursement.

This bill would provide that no reimbursement is required by this act for a specified reason.

Vote: majority. Appropriation: no. Fiscal committee: yes.
State-mandated local program: yes.

The people of the State of California do enact as follows:

1 SECTION 1. Article 6.9 (commencing with Section
2 20209.20) is added to Chapter 1 of Part 3 of Division 2 of the
3 Public Contract Code, to read:

4
5 Article 6.9. Transportation Design-Build Collaboration
6 Contracts
7

8 20209.20. The Legislature finds and declares all of the
9 following:

10 (a) It is the intent of the Legislature, in enacting this article, to
11 demonstrate an alternative and optional *pilot* procedure for
12 bidding on eight state highway construction projects, each valued
13 at more than ~~twenty-five million dollars (\$25,000,000)~~ *ten*
14 *million dollars (\$10,000,000)*, to be nominated by self-help
15 transportation agencies in counties where voters have approved
16 increases in local sales taxes through local ballot measures
17 focused on improving, among other things, the state highway

1 system in those counties. *For purposes of the pilot program, no*
 2 *project may use more than one hundred million dollars*
 3 *(\$100,000,000) of nonlocal sales tax measure funds and the*
 4 *aggregate amount of those funds that may be made available for*
 5 *all projects shall not exceed three hundred million dollars*
 6 *(\$300,000,000).*

7 ~~(b) (1) Self-help transportation agencies should be able to~~
 8 ~~utilize cost-effective options for delivery of highway projects, in~~
 9 ~~accordance with the national trend, that includes authorizing~~
 10 ~~public entities to utilize design-build contracts as a project~~
 11 ~~delivery method.~~

12 ~~(2) Utilizing a design-build contract requires a clear~~
 13 ~~understanding of the roles and responsibilities of each participant~~
 14 ~~in the design-build process. The benefits of a design-build~~
 15 ~~contract project delivery system include an accelerated~~
 16 ~~completion of the projects, cost containment, reduction of~~
 17 ~~construction complexity, and reduced exposure to risk for the~~
 18 ~~transportation authority.~~

19 ~~(3)~~
 20 (2) This approach toward the design-build project delivery
 21 method should be evaluated for the purposes of exploring the
 22 potential for reduced project costs, expedited project completion,
 23 or design features not achievable through the design-bid-build
 24 method. A pilot program will allow counties with voter-approved
 25 local transportation sales taxes to carefully examine the benefits
 26 and problems of design-build contracting on a limited number of
 27 projects.

28 (c) For the purposes of this pilot program, project sponsors
 29 will be required to provide at least 50 percent of funding from
 30 local transportation sales tax measures, and to consult with the
 31 Department of Transportation and receive approval of the
 32 California Transportation Commission for the use of the
 33 design-build procurement method. To preserve competition and
 34 objectivity in transportation contracting, a competitive bid
 35 process will be required.

36 (d) These projects are subject to the existing process under the
 37 state transportation improvement program (Chapter 2
 38 (commencing with Section 14520) of Part 5.3 of Division 3 of
 39 the Government Code) for planning, programming,
 40 environmental clearance, and funding. Projects that are either

1 identified in this article or ultimately chosen for demonstration of
2 the design-build collaboration project delivery method under this
3 article must comply with all existing requirements under the state
4 transportation improvement program for project development
5 and funding. This article shall not confer any type of competitive
6 advantage upon the projects in this article, relative to other
7 projects subject to the state transportation improvement program,
8 during other phases of project development.

9 20209.22. For the purposes of this article, the following
10 definitions apply:

11 ~~(a) “Best value” means a value determined by objective~~
12 ~~criteria, including, but not limited to, price, features, functions,~~
13 ~~life cycle costs, and other criteria deemed appropriate by the~~
14 ~~self-help transportation agency.~~

15 ~~(b)~~

16 (a) “Design-build” means a procurement process in which
17 both the design and construction of a project are procured from a
18 single entity.

19 ~~(c)~~

20 (b) “Design-build entity” means a partnership, corporation, or
21 other legal entity that is able to provide appropriately licensed
22 contracting, architectural, and engineering services as needed
23 pursuant to a design-build contract.

24 ~~(d)~~

25 (c) “Self-help transportation agency” or “agency” means a
26 transportation agency that administers a transportation
27 transactions and use tax in a county where the tax has been
28 approved by the voters.

29 ~~(e)~~

30 (d) “Department” means the Department of Transportation.

31 20209.23. For the purposes of demonstrating the design-build
32 approach, self-help transportation state agencies may utilize the
33 design-build procurement method for a maximum of eight
34 highway construction projects, provided that each project has a
35 total cost of more than ~~twenty-five million dollars (\$25,000,000)~~
36 *ten million dollars (\$10,000,000)*. Projects may be nominated by
37 self-help transportation agencies and the California
38 Transportation Commission shall, *after consulting with the*
39 *department*, select not more than eight projects from those
40 nominated by the agencies. *No project may use more than one*

1 *hundred million dollars (\$100,000,000) of nonlocal sales tax*
 2 *measure funds and the aggregate amount of those funds that may*
 3 *be made available for all projects shall not exceed three hundred*
 4 *million dollars (\$300,000,000).*

5 20209.24. A self-help transportation agency shall implement
 6 for design-build projects a labor compliance program as
 7 described in Section 1771.5 of the Labor Code, or it shall
 8 contract with a third party to implement on the agency's behalf a
 9 labor compliance program subject to that statute. This
 10 requirement does not apply to any project where the agency or
 11 the design-build entity has entered into any collective bargaining
 12 agreement or agreements that bind all of the contractors
 13 performing work on the projects.

14 20209.26. Bidding for design-build highway projects shall
 15 progress as follows:

16 (a) ~~After consultation with the department on project~~
 17 ~~nomination and approval by the California Transportation~~
 18 ~~Commission for use of design-build on the project, the self-help~~
 19 transportation agency shall prepare or cause to be prepared, a set
 20 of documents setting forth the scope of the project, as set forth in
 21 this subdivision. The documents may include, but need not be
 22 limited to, the size, type, and desired design character of the
 23 project, performance specifications covering the quality of
 24 materials, equipment, and workmanship, preliminary plans, and
 25 any other information deemed necessary to describe adequately
 26 the agency's needs. The performance specifications and any
 27 ~~plans shall be prepared by any design professional who is duly~~
 28 ~~licensed and registered in California. However, any, preliminary~~
 29 ~~engineering, or project reports shall be performed by the~~
 30 ~~department. The preliminary engineering or project reports shall~~
 31 be performed by professional engineers employed by the
 32 department.

33 (b) Based on the documents prepared under subdivision (a),
 34 the self-help transportation agency shall prepare a request for
 35 qualifications that invites interested parties to submit
 36 qualifications in the manner prescribed by the agency. The
 37 request for qualifications shall include, but need not be limited
 38 to, the following elements:

39 (1) Identification of the basic scope and needs of the project or
 40 contract, the expected cost range, the methodology that will be

1 used by the agency to evaluate qualifications, the process for
2 selecting from among prequalified parties the lowest responsible
3 bidder, and any other information deemed necessary by the
4 agency to inform interested parties of the contracting
5 opportunity.

6 (2) Significant factors that the agency reasonably expects to
7 consider in evaluating qualifications, including cost or price
8 lifecycle costs over 15 years or more, technical design and
9 construction expertise, skilled labor force availability, and all
10 other nonprice related factors. As used in this paragraph, “skilled
11 labor force availability” shall be determined by the existence of
12 an agreement with a registered apprenticeship program, approved
13 by the California Apprenticeship Council, that has graduated at
14 least one apprentice in each of the preceding five years. This
15 graduation requirement shall not apply to programs providing
16 apprenticeship training for any craft that was first deemed by the
17 Department of Labor and the Department of Industrial Relations
18 to be an apprenticeable craft within the five years prior to the
19 effective date of this article.

20 (3) The relative importance of the weight assigned to each of
21 the factors identified in the request for qualifications.

22 (4) If the agency reserves the right to hold discussions with
23 prequalified bidders, it shall so specify in the request for
24 qualifications and shall publish separately or incorporate into the
25 request for qualifications applicable rules and procedures to be
26 observed by the agency to ensure that any discussions or
27 negotiations are conducted in good faith.

28 (c) (1) In establishing the procedure to prequalify
29 design-build entities, the agency shall use a standard
30 questionnaire prepared by the agency. In preparing the
31 questionnaire, the agency shall consult with the construction
32 industry, including, but not limited to, representatives of the
33 building trades and surety industry. This questionnaire shall
34 require information including, but not limited to, all of the
35 following:

36 (A) If the design-build entity is a partnership, limited
37 partnership, or other association, a listing of all of the partners,
38 general partners, or association members known at the time of
39 bid submission who will participate in the design-build contract.

1 (B) (i) Evidence that the lead member of the design-build
2 entity has completed a state highway project in California with a
3 value of at least ~~twenty-five million dollars (\$25,000,000)~~ *ten*
4 *million dollars (\$10,000,000)* in the past 10 years.

5 (ii) Evidence that the members of the design-build entity have
6 completed, or demonstrated the experience, competency,
7 capability, and capacity to complete projects of similar size,
8 scope, or complexity, and that proposed key personnel have
9 sufficient experience and training to competently manage and
10 complete the design and construction of the project, as well as a
11 financial statement that assures the agency that the design-build
12 entity has the capacity to complete the project.

13 (C) The licenses, registration, and credentials required to
14 design and construct the project, including, but not limited to,
15 information on the revocation or suspension of any license,
16 credential, or registration.

17 (D) Evidence that establishes that the design-build entity has
18 the capacity to obtain all required payment and performance
19 bonding, liability insurance, and errors and omissions insurance.

20 (E) Information concerning workers' compensation experience
21 history and a worker safety program.

22 (F) A full disclosure regarding all of the following that are
23 applicable:

24 (i) Any serious or willful violation of Part 1 (commencing
25 with Section 6300) of Division 5 of the Labor Code or the federal
26 Occupational Safety and Health Act of 1970 (Public Law
27 91-596), settled against any member of the design-build entity.

28 (ii) Any debarment, disqualification, or removal from a
29 federal, state, or local government public works project.

30 (iii) Any instance where the design-build entity, or its owners,
31 officers, or managing employees submitted a bid on a public
32 works project and were found to be nonresponsive, or were found
33 by an awarding body not to be a responsible bidder.

34 (iv) Any instance where the design-build entity, or its owners,
35 officers, or managing employees defaulted on a construction
36 contract.

37 (v) Any violations of the Contractors' State License Law, as
38 described in Chapter 9 (commencing with Section 7000) of
39 Division 3 of the Business and Professions Code, excluding
40 alleged violations of federal or state law regarding the payment

1 of wages, benefits, apprenticeship requirements, or personal
2 income tax withholding, or Federal Insurance Contribution Act
3 (FICA) withholding requirements settled against any member of
4 the design-build entity.

5 (vi) Any bankruptcy or receivership of any member of the
6 design-build entity, including, but not limited to, information
7 concerning any work completed by a surety.

8 (vii) Any settled adverse claims, disputes, or lawsuits between
9 the owner of a public works project and any member of the
10 design-build entity during the five years preceding submission of
11 a bid under this article, in which the claim, settlement, or
12 judgment exceeds fifty thousand dollars (\$50,000). Information
13 shall also be provided concerning any work completed by a
14 surety during this period.

15 (G) In the case of a partnership or any association that is not a
16 legal entity, a copy of the agreement creating the partnership or
17 association and specifying that all partners or association
18 members agree to be fully liable for the performance under the
19 design-build contract.

20 (H) Acceptable safety record. A bidder's safety record shall be
21 deemed acceptable if its experience modification rate for the
22 most recent three-year period is an average of 1.00 or less, and its
23 average total recordable injury/illness rate and average lost work
24 rate for the most recent three-year period does not exceed the
25 applicable statistical standards for its business category or if the
26 bidder is a party to an alternative dispute resolution system as
27 provided for in Section 3201.5 of the Labor Code.

28 (2) The information required under this subdivision shall be
29 verified under oath by the entity and its members in the manner
30 in which civil pleadings in civil actions are verified. Information
31 required under this subdivision that is not a public record under
32 the California Public Records Act, as described in Chapter 3.5
33 (commencing with Section 6250) of Division 7 of Title 1 of the
34 Government Code, shall not be open to public inspection.

35 (d) The agency shall establish a procedure for final selection
36 of the design-build entity in which selection shall be based upon
37 a competitive bidding process resulting in lump-sum bids by the
38 prequalified design-build entities. Awards shall be made to the
39 lowest responsible bidder.

(e) (1) Notwithstanding any other provision of this code, upon issuance of a contract award, the ~~agency~~ *department* shall publicly announce ~~its~~ *the* award, identifying the contractor to whom the award is made, along with a written decision supporting ~~its~~ *the* contract award and stating the basis of the award. The notice of award shall also include all prequalified design-build entities.

(2) The written decision supporting the ~~agency's~~ contract award, described in paragraph (1), and the contract file shall provide sufficient information to satisfy an external audit.

20209.27. (a) No firm that is hired or paid by the self-help transportation agency to perform pre-bid services may bid or join with another company to bid for the design-build contract.

(b) For purposes of this article, prebid services include preliminary engineering studies and ~~another~~ other activities that lead to the selection of a project alternative. These activities encompass a variety of tasks, including, but not limited to, the following activities:

(1) Project geometric design.

(2) Earthwork calculations.

(3) Preparation of cross sections.

(4) Drainage design.

(5) Construction staging design.

20209.28. (a) Any design-build entity that is selected to design and build a project under this article shall possess or obtain sufficient bonding to cover the contract amount for nondesign services, and errors and omission insurance coverage sufficient to cover all design, engineering, and architectural services provided in the contract. This section does not prohibit a general or engineering contractor from being designated the lead entity on a design-build project for the purposes of purchasing necessary bonding to cover the activities of the design-build entity.

(b) Any payment or performance bond written for the purposes of this article shall be written using a bond form developed by the Department of General Services under subdivision (i) of Section 14661 of the Government Code.

20209.30. All bids by subcontractors that were not listed by the design-build entity in accordance with subparagraph (A) of paragraph (1) of subdivision (c) of Section 20209.26 shall be

1 considered by the design-build entity in accordance with the
2 design-build process set forth by the self-help transportation
3 agency in the design-build package. All bids by subcontractors
4 bidding on contracts under this article shall be subject to Chapter
5 4 (commencing with Section 4100) of Part 1 of Division 2. The
6 design-build entity shall do both of the following:

7 (a) Provide public notice of the availability of work to be
8 subcontracted in accordance with the publication requirements
9 applicable to the competitive bidding process of the
10 transportation authority.

11 (b) Provide a fixed date and time on which the subcontracted
12 work will be awarded in accordance with the procedure
13 established under this article.

14 20209.32. A deviation from the performance criteria and
15 standards established under subdivision (a) of Section 20209.26
16 may not be authorized except by written consent of *the*
17 *department and* the self-help transportation agency.

18 20209.34. (a) A self-help transportation agency shall consult
19 with the department in identifying appropriate design-build
20 demonstration projects to be constructed on the state highway
21 system that are described in this article.

22 (b) The department shall establish the parameters for the
23 extent of the participation of its employees in this demonstration
24 program.

25 (c) The department shall perform the construction inspection
26 for projects constructed under this article, including surveying
27 and testing the materials for each of the projects. All design
28 related documents shall be public records.

29 20209.36. Quality control inspection for the construction of
30 any project utilizing the design-build collaboration approach
31 authorized by this article shall be performed by employees of the
32 department.

33 20209.38. Nothing in this article affects, expands, alters, or
34 limits any rights or remedies otherwise available at law.

35 20209.40. (a) The retention proceeds withheld by a self-help
36 transportation agency from a design-build entity shall not exceed
37 5 percent.

38 (b) The self-help transportation agency shall not withhold
39 retention from payments to a design-build entity for actual costs
40 incurred and billed or design services, construction management

1 services, or where applicable, for completed operations and
2 maintenance services.

3 (c) In a contract between a design-build entity and a
4 subcontractor, and in a contract between a subcontractor and any
5 subcontractor thereunder, the percentage of the retention
6 proceeds withheld may not exceed the percentage specified in the
7 contract between the self-help transportation agency and the
8 design-build entity. If the design-build entity provides written
9 notice to any subcontractor who is not a member of the
10 design-build entity, prior to or at the time that the bid is
11 requested, that a bond may be required and the subcontractor
12 subsequently is unable or refuses to furnish a bond to the
13 design-build entity, then the design-build entity may withhold
14 retention proceeds in excess of the percentage specified in the
15 contract between the self-help transportation agency and the
16 design-build entity from any payment made by the design-build
17 entity to the subcontractor.

18 (d) In accordance with the provisions of applicable state law,
19 the design-build entity may be permitted to substitute securities
20 in lieu of the withholding from progress payments specified in
21 subdivision (b). Substitutions shall be made in accordance with
22 Section 22300.

23 20209.42. Not later than three years after a design-build
24 contract is awarded, the self-help transportation agency shall
25 submit a progress report to the Senate Committee on
26 Transportation and Housing and the Assembly Committee on
27 Transportation. The progress report shall include, but shall not be
28 limited to, all of the following information:

29 (a) A description of the project.

30 (b) The estimated and actual project costs.

31 (c) The design-build entity that was awarded the project.

32 (d) A description of any written protests concerning any aspect
33 of the solicitation, bid, proposal, or award of the design-build
34 project, including, but not limited to, the resolution of the
35 protests.

36 (e) An assessment of the prequalification process and criteria.

37 (f) An assessment of the impact of limiting retention to 5
38 percent on the project, as required under Section 20209.40.

39 (g) A description of the labor force compliance program
40 required under Section 20209.24, and an assessment of the

1 impact on a project where compliance with that program is
2 required.

3 (h) A description of the method used to award the contract. If
4 best value was the method, the factors used to evaluate the bid
5 shall be described, including the weighting of each factor and an
6 assessment of the effectiveness of the methodology.

7 (i) An assessment of the project impact of the “skilled labor
8 force availability” requirement imposed under paragraph (2) of
9 subdivision (b) of Section 20209.26.

10 (j) Recommendations regarding the most appropriate uses for
11 the design-build collaborative approach.

12 20209.44. This article shall remain in effect only until
13 January 1, 2015, and as of that date is repealed, unless a later
14 enacted statute, that is enacted before January 1, 2015, deletes or
15 extends that date.

16 ~~SEC. 2. The Bureau of State Audits shall conduct a~~
17 ~~pre-project and post-project audit of each design-build project~~
18 ~~authorized pursuant to Article 6.9 (commencing with Section~~
19 ~~20209.20) of Chapter 1 of Part 3 of Division 2 of the Public~~
20 ~~Contracts Code and compare them to similar design-bid-build or~~
21 ~~design sequencing projects and report the results to the~~
22 ~~Legislature. The bureau’s final report shall be delivered to the~~
23 ~~Legislature after each of the projects has been complete for five~~
24 ~~years.~~

25 ~~SEC. 3.—~~

26 *SEC. 2.* No reimbursement is required by this act pursuant to
27 Section 6 of Article XIII B of the California Constitution because
28 the only costs that may be incurred by a local agency or school
29 district will be incurred because this act creates a new crime or
30 infraction, eliminates a crime or infraction, or changes the
31 penalty for a crime or infraction, within the meaning of Section
32 17556 of the Government Code, or changes the definition of a
33 crime within the meaning of Section 6 of Article XIII B of the
34 California Constitution.